IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN DISTRICT REGISTRY BUKOBA
AT BUKOBA

LAND CASE APPEAL NO. 54 OF 2019

(Arising from Application No.1/2015 of Ngara DLHT)

JUSTUS. P. MUTAKYAWA..... APPELLANT

VERSUS

BERNADETHA KANYANKOLE.....RESPONDENT

JUDGMENT

8/4/2021 & 4/6/2021

KAIRO, J.

Being dissatisfied with the judgment and decree of Ngara DLHT delivered on 9th August, 2019, the Appellant registered an appeal to this court with three grounds as quoted in verbatim hereunder:

1. *THAT, the trial chairman of the tribunal grossly erred in law and on facts to hold that the Land at Plot No.49 Block" A" and plot No.48 Block "A" at Ngara Township is the property of the Respondent whereas the issue in contention in the pleadings and Evidence of the*

parties before the tribunal was not on ownership of the said Plots but on boundaries alone (Judgment and Decree annexed)

2. *THAT, the Trial Chairman of the tribunal erred grossly in law to deliver the judgment without recording and reading the opinion of assessors to the parties, the violation which goes to the root of the matter which vitiates (sic) the entire proceedings and the judgment to be nullity.*

3. *THAT, the Trial Chairman grossly erred in law to take up and preside over the matter which he was not formerly assigned without giving reasons of transfer of the case to be heard by him, the act which violated mandatory procedural laws.*

The Appellant prayed the appeal be allowed with costs with an order declaring the entire proceedings and resultant judgment and decree a nullity.

Parties opted to argue the appeal by way of written submission upon which the court order was promptly complied with. Mr Aron Kabunga Advocate stood for the Appellant so did Advocate Kelvin Mutatina for the Respondent.

In opening his written submission, Advocate Kabunga passed the court through a brief historical background of the matter. That the Respondent preferred an application in the District Land and Housing Tribunal of Ngara allegedly that the Appellant encroached 3 Meters in her Plot No.49 Block "A" Ngara Township. Upon adduce of evidence from both parties, the

tribunal held in favor of the Respondent that the Respondent is the lawful owner of Plot No.49 Block "A" and that the Appellants house allegedly in that plot be demolished.

As far as ground No.1 is concerned, the Appellant's counsel, Mr. Kabunga elaborated that it was an error for the tribunal to determine ownership of Plot No.49 Block A and Plot No.48 Block A and finally decided that they belong to the Respondent. It was Mr. Kabunga's argument that the pleadings before the trial Tribunal, the Respondent's claim was on the issue of trespass/encroachment to Plot No.49 Block and the Appellants defence was that he never encroached the said plot as he owns Plot No.48 Block A with the certificate of title. Further that he constructed the landed property after being issued with a building permit by Ngara District Council. To show that ownership was not an issue, Mr. Kabunga referred me on page 45 of the last paragraph of the typed proceedings that the Respondent himself admitted that the Appellant owned plot no.48 Block A and that they are neighbors. Kabunga was of the view that the exhibits A1, A2, A3 which were tendered to prove ownership had nothing to prove the contested issue of encroachment as ownership was not an issue.

Notwithstanding to what Mr. Kabunga had submitted above, He changed and took a different view of challenging the Respondent evidence which were tendered to prove ownership at the trial court by saying that the exhibits A1,A2,A3 which were tendered did not prove ownership of the Respondent to own Plot No.49 Block "A" because the Respondent had no any Certificate of Titles to that Plot and that according to Official search

from the Registrar of tittles which was tendered as exhibit RE.1 by the Appellant at page 74 &73 of the typed proceedings that plot No.49 Block "A" was a property of JASPER MVUNGI and after expiry of Right of Occupancy of 33 years, the plot reverted to the government todate.That the said evidence came to be cemented by RW2 BERNAD ESSAU LUKATUMBUZI, Authorized Land Officer at page 32 paragraph 2 and 3 of the typed proceedings where he said that the Respondent is not an owner of the suit land since it is in the name of the government and the District Council of Ngara had never allocated the said Plot to her.

Reverting to the issue which was before the tribunal that of encroachment, Mr.Kabunga submitted that it is trite law that he who alleges must prove as stipulated under section 110 and 111 of the Evidence Act, Cap 6 R.E 2019.That there was no evidence to prove whether the Appellant encroached 3 meters, adding that the type of evidence was to be proved by District Council authorities e.g. Land Office of Ngara District to verify whether the House of the Appellant built on Plot No.48 Block "A" encroached 3 meters of Plot No.49 Block "A" alleged to be of the Respondent.

He further argued that at page 83, the tribunal had issued an order to visit the suit land but up to pg. 87 when the proceedings were terminated to wait for judgement delivery, no visit was ever conducted. Hence, he was of the view that 3 meters encroachment remained mere conjuncture and wishful allegation of the Respondent. The Appellant contended that his building was properly constructed as required by law after obtaining a

building permit from Ngara District Council which was admitted as exhibit RE2 at page 76 of the typed proceedings. He argued that if a person obtains a building permit, he has to construct a building in full supervision of the issuing authority and any departure to the said permit the issuing authority has power to order demolition or stop the construction. That it was the duty of the Respondent to cross examine RW2; the land officer on the issue of encroachment and legality of the building of the Appellant but they never exploited that chance.

It was the Appellant's counsel further submission that the evidence and record clearly point out that the issue of encroachment was not established and thus non-existent. He therefore wonders where the tribunal got such evidence of encroachment. He prays that the judgment and decree be set aside by ordering that there is no trespass or encroachment as alleged and that the order for demolition be quashed.

Concerning the 2nd ground, it was the Appellant's submission that after closure of Defense case at pg 84, the trial chairman never sought opinions from assessors. Besides, even in the judgment, nowhere it is indicated that he sat with assessors and they gave opinions. According to Mr. Kabunga that illegularity is fatal and is not curable at all, as such the whole proceedings is vitiated.

Coming to the 3rd and last ground, Mr. Kabunga submitted that there was transfer of a case between presiding chairmen without giving reasons for such transfer. Mr. Kabunga further presented that hearing commenced before Hon Chairman J.K Bantulaki where the evidence was taken (Page 38

to pg 50). That at pg 67 Chairman Kitungulu is seen taking over the matter where AW1 was cross examined and other witnesses testified. He argued that the law requires the person who has commenced a hearing to complete the trial, short of that any change of a presiding judge or magistrate or chairman, a reason for such change must be given. Advocate Kabunga abstained from citing any authority on the ground that the authorities are many.

In the rebuttal submission, Advocate Kelvin Mutatina dismissed Mr. Kabunga's argument by saying that there is nowhere in the proceedings and judgment the tribunal held that the land on Plot No.49 Block "A" and Plot No.48 Block A at Ngara Township belongs to the Respondent. That the judgment is clear on pg 45 that there is no dispute on ownership. Mr. Mutatina submitted that the Appellant's duty was to adduce evidence telling the court that he did not trespass on Plot No.49 Block A at Ngara rather than wasting time of the court to explain ownership issue while himself blames the tribunal that it was not supposed to touch on ownership which was not an issue between parties.

Responding on Appellant's counsel submission that there was no evidence to prove trespass at the trial tribunal, Mr. Mutatina replied that at pg 4 of the tribunal judgment, the chairman candidly held that according to the written correspondences from land allocating Authority(The Ngara District Council) which were tendered as evidence (Refer exhibits A1-A5) the letter dated 13/10/2014, and the one dated 20/11/2015 showed that the Appellant herein trespassed on Plot No.49 Block "A" Ngara township.

Responding on the 2nd ground, Mr. Mutatina submitted that the Assessors were invited to opine as reflected on pg. 86 of the typed proceedings. That assessors' opinions are in the court record. Kelvin further elaborated that the DLHT record includes proceedings, judgment, exhibits and written opinion by assessors. In his view for the case at hand, the opinions of assessors were written down and read to parties thus serving the purpose of Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003. That the opinions form part of the record attached like the judgment and exhibits altogether.

Touching on the 3rd ground of change of presiding Chairmen, it was Advocate Mutatina's conviction that the said ground lacks merit as the Appellant's counsel has evasively and taken for granted thinking that this honourable court can easily grant without being moved by specific law and legal authority. He pointed that since they would have no further chance to react and counter on the purported ground without legal authority, he will respond on it. He substantiated that Both parties to appeal plus their respective advocates know clearly that Kitungulu took over the conduct of this case from R.E Assey out of the ruling dated 24.7.2017 where all reasons for a new presiding chairperson were canvassed therein. All parties and their respective advocates were aware of the new Chairperson and the reasons were stated in the said ruling. That even when the matter came to proceed with the third and new chairperson the parties plus their advocates, that is Kelvin for Applicant and Mr. Zeddy for the Respondents did not raise any query at all. (Pg. 67)

Mr. Kelvin Mtatina, submitted that with the advent of the overriding objective principle brought by the Written Laws (Miscellaneous Amendments) (No.3) Act No.08/2018, the courts are required to take into regard to substantive justice and cut back on over-reliance on procedural technicalities. On that regard, Mr. Mutatina further submitted that leaving alone ground number one which has no leg to stand for insinuating on facts which are not reflected in the judgment, the other two grounds of appeal do not touch any complaint regarding evidence (substantive justice) that prejudiced the Appellant but they centered on the procedural tenets which in fact did not affect or prejudice the evidence of the Appellant.

The Respondent's counsel had the view that since the boundary issue commenced in year 2014 and has consumed lot of time as per the correspondences which were tendered as exhibits, he prays from this court to uphold the decision of the trial court for sake of substantive justice rather than procedural technicalities which in fact might not be the fault of the parties but the court. To bolster his argument, he referred this court to the case of **Mount Meru Flowers Tanzania Limited vs Box Board Tanzania Ltd;** Civil Appeal No.260/2018 CAT at Arusha (Unreported) wherein the court gave a celebrated Principle that "*Parties should not be punished for errors committed by the court and cases need to come to an end if the court sees that no substantive justice was breached*". He prayed this court uphold the tribunal judgment and an order which directed the Appellant to liaise with the land allocating authority regarding their boundaries.

I had an ample time to keenly peruse the entire record of this appeal. Further, having considered the rival submissions of both parties, the task before me is to determine whether this appeal has merit. I will do so by discussing the three grounds of appeal in seriatim.

Starting with the first ground whether the tribunal had raised the issue of ownership which according to him was not an issue between parties and thereby giving ownership of both plots to the Respondent. This ground should not detain me. As rightly submitted by Advocate Mutatina there is no where in the judgment the tribunal stated that the two plots were declared to be the property of the Respondent. I further concur with the Respondent's counsel that pg.4 of the tribunal judgment speaks itself where the tribunal admitted that parties have no dispute on ownership of Plots. The only issue which the tribunal determined was encroachment/trespass by the Appellant with Plot No.48 Block "A" to overstep 3 meters to the Respondent's plot No.49 Block "A" thereby constructing a landed property thereat. Admittedly, the Appellant did not register this ground of encroachment/trespass in his memorandum of appeal though he proceeded to submit on it which triggered the Respondent to reply on it. For the need of attaining substantive justice and as it goes to the root of the entire matter, I will also proceed to determine it.

The Appellant proposes that there was no evidence at the trial tribunal adduced to show that the Appellant had encroached the Respondent's Plot No.49. That the built-in property was constructed after obtaining the

building permit from Ngara District Council authority. The Respondent's counsel opposes that there were concrete evidence showing that the Appellant trespassed. I had to pass through the typed trial tribunal proceeding and quoted part of the evidence testified by the Respondent concerning encroachment. Before I quote, it is important to note that the first appellate court is mandated to re-evaluating the evidence afresh before arriving at its conclusion. The part to be quoted is page 45 of the proceedings wherein the Respondent when examined in chief testified:

"I know Justus Paul Mtakyawa. He is a neighbor to my Plot No.49 Block A. Though we are neighbors but our relationship is not good because the said Justus has trespassed into my land. I did take an action to the relevant Authority. The said letter is dated 13/10/2014 I pray to tender the same to form part of evidence....." (pg.46 continues) *...Having received the said letter DED-NGARA responded by writing to us directing us to go together to the area in dispute to go through the existing boundaries or to look up on the same.* On pg.47 continues

"...The said letter is dated 20/11/2014. I pray to tender the same to form part of my submission"

After the said letter of summoning parties to attend to the *locus in quo* was admitted to court as exhibit A6 on pg.48 the Appellant went on to testify:

" We did attend the site on the said 21/11/2014, the land officer also attended and it was realized after valuation that the Respondent had encroached for about several metres. To the effect the Respondent was

notified by letter from DED-NGARA dated 20/1/2015 I pray to tender the same to form part of my evidence"

The letter from DED indicating that the Appellant trespassed was admitted as exhibit A7 (pg 47 proceedings).

The above testimony by the Respondent shows that, the Appellant's encroachment to her Plot is being evidenced by the admitted exhibits A6 which is the letter of complaint to relevant authority and exhibit A7 being the letter from DED after visiting the suit land and confirming that the Appellant encroached by exceeding 3 Metres into the Respondent Plot 49 Block "A", I am thus convinced that the Respondent's evidence at the trial tribunal was heavier than that of the Appellant and even beyond the standard proof in Civil cases which is on the balance of probabilities. Mr. Kabunga had argued that since the Appellant had obtained the building permit, thus could not have trespassed as the building permit when given requires supervision during construction. However, I don't concur with that proposition with due respect. In my views, obtaining a building permit is one thing and trespassing during construction is another thing altogether. It is possible for one to have a building permit directing him where to build a property but intentionally or unintentionally trespasses to another person's land. After all there was no evidence from the Appellant that during the construction the property, he was being supervised. As such the argument is just a mere allegation which remains unproved. As if that is not enough, exhibit A7 which is the letter from the same Ngara District Council from where the Respondent claims to have obtained a building

permit from, negates the probative value of Exhibit RE2 (building permit) that the Appellant had never been given a building permit save that he was shown where to erect a building. Moreover, in exhibit A7, after paying a visit to the suit premise, it was revealed that the Appellant trespassed by overstepping 3 meters to the Respondent Plot. This could be the reason why the tribunal didn't see the need of visiting the suit land. From the above analysis, I am constrained to rule out that the tribunal was right to have arrived at its conclusion that the Appellant had entered 3 meters into the Respondent plot.

Coming to the second ground of recording assessors' opinions. In this ground I feel obliged to reproduce the provision of Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations,2003 which also the Respondent's counsel referred me to:

" Notwithstanding sub-regulation (1) the Chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili"

Mr. Kabunga proposes that there is no opinion typed neither in the proceedings therein nor in the judgment. Mr. Mutatina on his part disputed the argument arguing that the opinion was written by assessors and attached in separate sheets and therefore they form part of record just like proceedings, exhibits and all similar documents.

From the above discourse, I had to peruse the entire record and finally came up with the two Swahili hand written documents titled **"maoni"** signed by **Hellen Adrian** and **Justice K. Muyogoro** identified as **"wajumbe wa baraza"** When further cross-check to see if they ever appeared in the proceedings (corams) as members, I confirmed that they appeared on diverse dates when hearing was proceeding. I paused to ask does the law require opinions to be re- written by the chairman in the proceeding? The answer is not hard to pick from the above cited provision. With the aid of plain meaning rule in statutory interpretation to the cited provision, the words are required to be given their natural and plain meaning during interpretation. Therefore regulation 19(2) requires the opinion by assessors to be presented to the chairman in writing and in Kiswahili as was done in this case. With due respect to Advocate Kabunga, the law does not impose mandatory requirement for assessors' opinion to be reproduced in the proceedings. The intention was to ensure that the assessors submit their opinions to the chairman before he writes a judgment which in this case the said purpose was fulfilled. I thus join hands with Mr. Mutatina that since they were recorded/written and read before the tribunal chairman and annexed in the case file, it suffices to fulfil the purpose of the law and the same form part of the tribunal's record like any document in the case file.

As far as the **third ground** is concerned on the transfer of the case file and change of magistrate, Mr. Kabunga's stance was that changing of presiding magistrate or tribunal chairman without according reason is fatal

and vitiates the entire proceedings. He was of the view that there was no reason for the change of presiding chairmen recorded in the proceedings. Mr. Mutatina's rival argument is that the reason was given through the ruling of Chairman Assey and parties together with their advocates were aware and raised no objection, besides there was no evidence that parties were prejudiced in any way.

Both learned counsels did not attempt to refer this court to any authority. As much as I now, there are a plethora of authorities regulating this area. In **Charles Chama and others vrs Regional Manager TRA and others** Civil Appeal 224/2018, the proceedings passed through hands of three judges without assigning reasons and the last one who wrote a judgment was not the one who heard the case. The entire judgment and conviction thereon were quashed and the proceeding was partly reversed back at the point where the third judge chipped in to write a judgment. The court refuted to invoke the principle of Overriding Objective (on the focus of substantive justice) to cure this irregularity as prayed by state attorneys. However, the same principle of overriding objective was accepted and applied by the same court in **Chacha Jeremiah Murimi & 3 v Republic**, Criminal Appeal No.551/2015(Unreported). Part of the reasoning of accepting the oxygen principle by Court of Appeal justices on pg 17 of their typed judgment was couched thus:

"To begin with, in Chacha Jeremiah Murimi's case(supra), the arguments related to compliance with section 299 of the CPA as there was partial compliance. In the present case however, not only did the successor

judges omit to assign reasons for the takeover, but more serious is the fact that the judgment was composed by the third successor judge who did not hear even a single witness. Having been a total stranger to the case, she was surely not in good position to do justice in the case. In our view, that aspect makes a big difference."

From the above two authoritative cases of the Court of Appeal, it is apparent that every case has to be decided on its own facts. I am alive to the fact that wherever an adjudicator starts hearing a case, he/she must finish it and in case of change, a reason has to be given. The justification and rationale behind giving reason has been two folds; **one** that the one who sees and hears the witness is in the best position to assess the witness's credibility which is very crucial in determination of any case before a court; and **two** that the integrity of judicial proceedings hinges on transparency, as such where there is no transparency, justice may be compromised.-See the cases of **David Kamugisha Mulibo,Tryphone Elias @Ryphone Elias and Kinondoni Municipal Counci**l(supra),**Ms Georges Centre Ltd v.The Attorney General & Another,** Civil Appeal No.29/2016 and **Kajoka v The Attorney General and Another**, Civil Appeal No.153 of 2016 (all unreported)

In the case of **Abdi Masoud Iboma and 3 others v Republic**, Criminal Appeal No.116/2015 (Unreported), the court stated as follows on the issue of non-compliance with the giving of reason for change of magistrate.

"...It is a prerequisite for the second magistrate's assumption of jurisdiction. If this is not complied with, the successor magistrate would

have no authority or jurisdiction to try the case since there is no reason on record in this case as to why the predecessor magistrate was unable to complete the trial, the proceedings of the successor magistrate were conducted without jurisdiction hence a nullity"

In **Priscus Kimaro v R** Criminal appeal, No.301 of 2013(unreported) The court stated as follows

"*Where it is necessary to re assign a partly heard matter to another magistrate, the reason for the failure by the first magistrate to complete must be recorded. If that is not done, it must lead to chaos in the administration of justice. Any one for personal reasons could pick up any file and deal with it to the detriment of justice*"

The rival arguments of the parties' learned counsels are to the effect that: whereas Mr. Kabunga asserts that there was no reason for the change of presiding chairman, Mr. Mtatina contends that the reason was in the ruling of the disqualifying chairman. The begging question therefore is whether there was a reason for the incoming Kitungulu to take over from where Bantulaki ended. The answer is on the proceedings; on 23/06/2017 the Hon. Chairman Assey wanted to take over and proceed with the case hearing from where Bantulaki ended, but he was objected. On 24/07/2017 at pg.57 Hon. Assey composed a ruling where he recorded a reason of disqualifying himself to pave way for the matter to wait for a new chairman to be appointed. On 29/8/2017, (pg. 59) Hon. Assey adjourned the matter in the presence of parties for the reason of waiting for the new chairman. On 31/10/2017 (pg. 60) Hon.Assey informed parties that the new

Chairman was yet to be appointed. On 27/6/2018 Hon.Assey gave an order for the matter to proceed before the new appointed Chairman; Hon. Kitungulu. (pg. 66). On 23.7.2018, Hon. Kitungulu came and took over the matter.pg 67.

Basing on the chronological of events as above narrated, nowhere the parties or their advocates were surprised with the new chairman taking over. Instead in my view, they were anxiously waiting for him so that their case can proceeds. Besides, the parties were not prejudiced in anyway nor their rights affected. The fact that they were able to object to the taking over of Hon Chairman Assey, I am convinced that they would have done the same to Hon Chairman Kitungulu if they had any reservation against him. The above analysis has made this court to rule out that this ground of appeal is again without merit with much respect. I agree with Advocate Kelvin Mutatina's assertion that the reason for the outgoing and incoming Chairmen was in the ruling of Hon. Assey when he disqualified himself. Besides, Chairman Kitungulu was taking over from Hon. Assey, thus in my view he wasn't expected to give the reason of the change over from Hon. Bantulaki to Hon Assey. Generally, Parties together with their advocates were confident and comfortable with Hon.Kitungulu in my view as they did not raise any query. The ground of change of the magistrate without reason by Appellant's counsel is therefore an afterthought which negates what transpired with much respect. Be it as it may, even if it is assumed that Hon. Kitungulu was supposed to give reason as to why Hon. Bantulaki

disappeared, still this omission would have been saved/cured by the Court of Appeal's decision in the case of **Chacha Jeremiah Murimi** (Supra).

With the coming of overriding objective in the CPC, things have now changed, not every lapse or oversight of law will vitiate the entire proceedings instead, courts are duty bound to assess the whole circumstances surrounding the entire case. I am fortified in this stance from the holding of the case of **Mount Meru Flowers Tanzania Limited** (Supra) as rightly referred by the Respondent counsel whereby the court ruled out that "*parties should not be punished by omissions done by courts rather courts should decide on substantive justice and do away from undue procedural technicalities which even do not even prejudice parties in anyhow".*

Besides the law is settled that procedural irregularity should not vitiate proceedings if no injustice has been occasioned. (See: **Rawal v. Mombasa Hardware** [1968] and **Cooper Motors Corporation (T) Ltd. v. A.I.C.C.,** [1991] TLR 165.)

For the foregoing, this appeal fails in its entirety and consequently dismissed with costs. The trial tribunal's judgment is therefore upheld.

It is so ordered.

L.G. Kairo,

Judge

4/6/2021.

R/A Explained.

L.G. Kairo,

Judge

4/6/2021.

Date: 04/06/2021

Coram: Hon. J. M. Minde – DR

Appellant: Present

Respondent: Present

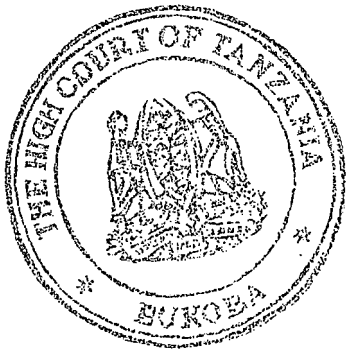
B/C: Lilian

Advocate Frank for the appellant and advocate Mulokozi for the respondent but holding brief for advocate Kevin:

This matter is set for judgment.

Court:

Judgment delivered this 4/6/2021 in the presence of the parties and their advocates.



Sgd: J. M. Minde – DR

02/06/2021